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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 989

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BILLY BAXTER, INC.,

*Petitioner,*

v.

THE COCA COLA COMPANY and
CANADA DRY CORPORATION,

*Respondents.*

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# PETITION FOR REHEARING FOR WRIT OF CERTIORARI

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## TABLE OF AUTHORITIES

Cases:


Fields Productions, Inc. v. United Artists Corp.
(Docket No. 1062) ..... 1, 2

Mulvey v. Samuel Goldwyn Productions
433 F2d 1073 (9th Cir.) ..... 2

Dredge Corp. v. Penny
338 F2d 456 (1964) ..... 5

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## PETITION FOR REHEARING FOR WRIT OF CERTIORARI

When the Petition for Certiorari was denied, petitioner was indeed disappointed but nevertheless resolved to file a motion for Rehearing asking that the Court grant Certiorari in this case at the time when it would grant Certiorari in the then pending case of *Fields Productions, Inc. v. United Artists Corp.* (Docket No. 1062)

Petitioner's disappointment became compounded when Certiorari was denied in the *Fields'* case, one week after the

denial in the instant case.

Petitioner has always felt that the instant case was not only deserving of, but indeed *required*, granting of Certiorari by this Court.

At issue here lies what has been described in a brilliant dissent by a member of the Circuit Court below as a "talismanic rule of lack of standing" in the interpretation of antitrust law. With no pronouncement from this Court, the Circuits have directly split over the subject matter of this petition. *Mid-West v. Samuel Goldwyn Productions*, 433 F.2d 1073 (9th Cir., 1970); *Fields Productions, Inc. v. United Artists Corp.*, 432 F.2d 1010 (2nd Cir., 1970).

Contemporaneously with the filing of petitioner's reply brief petitioner received an indication from the offices of the Solicitor General that the Solicitor General and the Antitrust Division of the Department of Justice did not consider the case meritorious for the filing by the Federal Government of a brief *amicus curiae*.

This determination was soon confirmed by a letter from Dean Griswold. The thoughts that will follow in this motion were conveyed to Dean Griswold by letter before the Court denied Certiorari in the instant case. He replied defending the Court's procedure.

As petitioner views it, there are three areas dominating the Court's grants of Certiorari, 1) Criminal Law, 2) Civil Rights and 3) Petitions in general by the Solicitor General -- leaving the area of Federal civil litigation (in those cases where the Solicitor General does *not* join in petitions for Certiorari) with a diminishingly small share of grants of Certiorari.

Counsel for petitioner has done an extensive study and has ascertained that since the Judge's Act of 1925, no petition for Certiorari by a Federal contractor -- whose work represents in excess of 10% of our nation's gross national product -- has ever been granted over the objection of the Solicitor General. On the other hand, the Solicitor General has achieved Certior-

ari in approximately 40 cases. This study was undertaken by counsel for petitioner in the course of preparation of an as yet unpublished book on the United States Supreme Court and Government Contracts.

This knowledge made him fearful that the instant case, the most important 1970 case in the antitrust field because of the Direct-Indirect damage problem and the clarity of Judge Waterman's dissent, would nevertheless not receive Certiorari.

Petitioner recognizes that because of time limitations creating a condition like that spoken of in the New Testament as "Many are called but few are chosen", few cases are accepted for full argument and opinion -- perhaps 140 cases out of 4,500 in a particular year(projecting the March 5, 1971 Appellate and Pauper Docket figures of 1438 and 1690 cases respectively to June 28, 1971, the expected date of the end of the October 1970 term.) Petitioner is concerned that if Criminal Law, Civil Rights and the Solicitor General each receive one-third of the grants of Certiorari none are available for the Federal civil litigation sector.

The spirit of negativism premising the Certiorari system frankly frightens petitioner. It seems to resemble panning for gold in California in the 1840s or baseball umpires calling balls and strikes. Years ago a fine hitter complained to a fine umpire about an obvious ball that had been called a strike. The umpire answered "You want to know why it's a strike. It's because I called it a strike. Get back up to bat."

There is another sports anecdote that illustrates the problem of negativism. Just after the Second World War, Joseph Kuharich was the Notre Dame coach. He believed his assistant coaches were unduly critical in recruiting High School players for scholarship grants. At a meeting called to consider two ostensible High School players, he ran a game film of them and asked his coachsto observe an end and a halfback. As the film ran, the assistant coaches rejected the end for lack of running speed and inability to cut sharply for

passes. They rejected the half back for comparable reasons. At the end of the film, the camera panned to the score board, showing the game to have been between World War II Service teams, Iowa Preflight and Great Lakes Naval Training Center. The Assistant coaches were outraged by the deception practised on them. The outrage sought to hide the fact that the end and half back rejected by them, respectively, were Elroy (Crazy Legs) Hirsch and Buddy Young, who by the time of the showing of the film were stars in the National Professional Football League and today are deserved members of its Hall of Fame.

Some years ago when the Appellate Docket was about 45% of what it is today, petitioner understands that Anthony Lewis of the New York Times wrote that the Court in conference devoted an average of seven minutes in deciding each petition for Certiorari. Forty-five percent of seven minutes is three minutes which leaves petitioner increasingly uncomfortable with the analogy of the baseball umpire calling balls and strikes.

Quite obviously the Justices' law clerks are playing a significant role in the winnowing process. The role is clear; their intelligence is clear. On the other hand because of youth, their experience is lacking. Their national perspective is extremely doubtful (and also may be the Court's as indicated by the instant case, the *Fields* case and the Government contract cases) -- factors calling into question their wisdom and judgment).

Petitioner asks the Court to hypothesize with it a breakdown of the Certiorari system, with the Court becoming incapable of keeping up its part in the separation of our Government into three parts. At whose initiative should changes come about, the Court or Congress?

The obvious remedy would be either to increase the size of the Court and have it sit in panels or to have an intermediate panel (analagous to the Judicial Panel on Multidistrict Litigation) initially screen cases for Certiorari or even such Panel itself to resolve conflicts between circuits.

The frailty of the Certiorari system is nowhere better exemplified than in this case where the Respondent's principal argument for denial of Certiorari was the number of

earlier denials of Certiorari! How many people have to come knocking at the door before one of them is given an entrance to the foyer? A jurisprudence is growing up in the country announcing law based on denials of Certiorari. It is like the cockle growing among the wheat, eventually to stifle the wheat.

Petitioner has endured many injustices during the course of this litigation. As a "flyer", Respondents filed their motion for summary judgment at the District Court at a time when such a motion was premature because of outstanding discovery unfurnished the petitioner. The motion was intended to delay the furnishing of the discovery (A good example of the status of discovery was Canada Dry's manifestly obvious perjury in answering Interrogatories under oath that it and its advertising agencies did not know the amounts spent by it for advertising of product lines in particular years. Furthermore, Coca Cola never answered petitioner's Interrogatories because of a stipulation that the Interrogatories be answered after completion of the deposition of petitioner's president. Coca Cola, by maneuvers, kept open the deposition. Part of the maneuvering was the Summary Judgment Motion, which has proven a handsome windfall. Trial by Ambush may be dead but it appears that there is now born Summary Judgment by Ambush.) The District Court judge refused to allow petitioner oral argument on the Motion for Summary Judgment. He ignored a letter from petitioner after the argument pointing out that time had run out and he had not allowed petitioner any oral argument. *Dredge Corporation v. Penny*, 338 F2d 456 (1964) It requested oral argument in the event the motion for summary judgment was going to be granted. He took 10 months before deciding the motion in respondents' favor.

Those injustices were nothing compared to the injustice to petitioner from the present Certiorari system, which petitioner submits in its present form and with the present manpower of the Court is not working. This is not a question of someone objecting to a liberal or a conservative Court. It represents a defect in the Court's procedure.

The Court is preeminent among the Courts of the world. Its traditions, even this relatively new tradition of Certiorari, are treated with awe and respect by those who deal with the Court. However, constant reexamination of procedures is the life of the law. Petitioner urges upon the Court that even if this Motion for Rehearing is denied, as a minimum, documents such as this in the future be called something else because to petitioner it seems strange to be asking for a Rehearing.

Returning to the merits of the motion, the Direct-Indirect damage tests being left to the conflict in the Circuits substantially destroys the Sherman Act in those Circuits that follow the instant Second Circuit opinion. Always there is someone else in a predicament comparable to that of a plaintiff in a particular case. If the bottlers as the Second Circuit ruled were the parties directly damaged in the instant cases had themselves sued the Court in their different case could just as readily have found them to be *indirectly* damaged and the Billy Baxter to be *directly* damaged. So it becomes a game where defendants point to a missing damaged person and say "Look he's the one directly damaged. This plaintiff is only indirectly damaged." This defense has become an automatic defense in every antitrust case seeking treble damages. As indicated in the Petition for Certiorari, except for merger cases, the treble damage remedy has become the principal remedy against antitrust violations. The $50,000 criminal fine has been characterized by some as a "license fee" and lower eschelon corporate officers can always be found available to take a vacation at a penitentiary.

Ironically, Courts in the Circuits agreeing with the Second Circuit now allow some Summary Judgments before plaintiffs have discovery to prove themselves to be the intended targets of the antitrust violation. These Courts say that intention is of no consequence thus allowing antitrust preditors to accomplish *indirectly* what they could not accomplish *directly*. Intentional indirect damage thus becomes unactionable and unintentional direct damage is actionable.

One could never imagine that the Antitrust Laws could fall into such a state of disarrary, explainable only in terms of lower Courts granting their brand of Certiorari. Perhaps it can be explained on the basis of a presumed necessity to suppress the treble damage remedy. As petitioner views it the greatest frustration pervading the tragic course of the instant case has not been Respondents' counsels prematurely seeking summary judgment when they knew they were not entitled to it, or the unusual handling of the summary judgment motion by the District Court Judge or the failure of the Second Circuit to conform to the view of the Ninth, Eighth and Fourth Circuits, but rather has been the Certiorari system that has not allowed this case to be heard by the United States Supreme Court.

This leaves our Courts of Appeals truly Federal Courts, harkening back to the days of Articles of Confederation, and, therefore, autonomous and not *National* courts evolving a *national* rule for implementation of a *national* law.

Returning for a moment to the reference to litigation involving Federal contracts, it can fairly be argued that the Courts of Appeals were established in 1890 because of volume of litigation coming to this Court from the settlement of the Civil War contracts. Further, it can fairly be argued that the Certiorari procedure itself was adopted in 1925 because of the volume of such cases coming to this Court from the settlement of the World War I contracts. Accordingly, there *is* irony in the fact that since 1925 no contractor holding a Federal contract has had Certiorari granted in its favor without the concurrence of the Solicitor General.

Petitioner's observations on the Certiorari system have validity only to the extent that its petition for Certiorari merited Certiorari except for time limitations on the present number of Justices of the Court and the absence of a panel of mature judges to screen cases for Certiorari. Petitioner hopes that this brief has indicated the mistake in not granting Certiorari and that the Court will reconsider its denial of Cer-

tiorari and on reconsideration grant Certiorari.

## CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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